STATE OF SOUTH CAROLINA)
)

(Caption of Case)

In the Matter of Petition for Approval of Nextel South Corp.'s Adoption of the Interconnection Agreement Between Sprint Communications L.P., Sprint Spectrum L.P. d/b/a Sprint PCS and BellSouth Telecommunications, Inc. d/b/a AT&T South Carolina, d/b/a AT&T Southeast)

BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

COVER SHEET

DOCKET NUMBER: 2007 - 255 - C

(Please type or print)
Submitted by: Patrick W. Turner

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NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for use by the Public Service Commission of South Carolina for the purpose of docketing and must be filled out completely.

DOCKETING INFORMATION (Check all that apply)

☐ **Emergency Relief demanded in petition**

☐ **Request for item to be placed on Commission's Agenda expeditiously**

☐ **Other:**

INDUSTRY (Check one)

- ☐ Electric
- ☐ Electric/Gas
- ☐ Electric/Telecommunications
- ☐ Electric/Water
- ☐ Electric/Water/Telecom.
- ☐ Electric/Water/Sewer
- ☐ Gas
- ☐ Railroad
- ☐ Sewer
- ☒ Telecommunications
- ☐ Transportation
- ☐ Water
- ☐ Water/Sewer
- ☐ Administrative Matter
- ☐ Other:

NATURE OF ACTION (Check all that apply)

- ☐ Affidavit
- ☐ Agreement
- ☒ Answer
- ☐ Appellate Review
- ☐ Application
- ☐ Brief
- ☒ Certificate
- ☐ Comments
- ☐ Complaint
- ☐ Consent Order
- ☐ Discovery
- ☒ Exhibit
- ☐ Expedited Consideration
- ☐ Interconnection Agreement
- ☐ Interconnection Amendment
- ☐ Late-Filed Exhibit
- ☒ Letter
- ☐ Memorandum
- ☒ Motion
- ☐ Objection
- ☐ Petition
- ☐ Petition for Reconsideration
- ☐ Petition for Rulemaking
- ☐ Petition for Rule to Show Cause
- ☐ Petition to Intervene
- ☐ Petition to Intervene Out of Time
- ☐ Prefiled Testimony
- ☐ Promotion
- ☐ Proposed Oder
- ☐ Protest
- ☐ Publisher's Affidavit
- ☐ Report
- ☐ Request
- ☐ Request for Certification
- ☐ Request for Investigation
- ☐ Resale Agreement
- ☐ Resale Amendment
- ☐ Reservation Letter
- ☐ Response
- ☐ Response to Discovery
- ☐ Return to Petition
- ☐ Stipulation
- ☐ Subpoena
- ☐ Tariff
- ☒ Other: Motion to Dismiss and Answer

Print Form Reset Form

at&t

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August 10, 2007

The Honorable Charles Terreni
Chief Clerk of the Commission
Public Service Commission of South Carolina
Post Office Drawer 11649
Columbia, South Carolina 29211

Re: In the Matter of Petition for Approval of Nextel South Corp.'s Adoption of the Interconnection Agreement Between Sprint Communications L.P., Sprint Spectrum L.P. d/b/a Sprint PCS and BellSouth Telecommunications, Inc. d/b/a AT&T South Carolina, d/b/a AT&T Southeast
Docket No. 2007-255-C

Dear Mr. Terreni:

Enclosed for filing are an original and one (1) copy of BellSouth Telecommunications, Inc.'s d/b/a AT&T South Carolina's Motion to Dismiss and, in the Alternative, Answer in the above-referenced matter.

By copy of this letter, I am serving all parties of record with a copy of this Motion as indicated on the attached Certificate of Service.

Sincerely,

Patrick W. Turner

PWT/nml
Enclosure
cc: All Parties of Record
DM5 #683303

THIS DOCUMENT IS AN EXACT DUPLICATE OF THE E-FILED COPY SUBMITTED TO THE COMMISSION IN ACCORDANCE WITH ITS ELECTRONIC FILING INSTRUCTIONS.

BEFORE THE
SOUTH CAROLINA PUBLIC SERVICE COMMISSION

In the Matter of Petition For Approval of Nextel South Corp.'s Adoption of the Interconnection Agreement Between Sprint Communications L.P. / Sprint Spectrum L.P., d/b/a Sprint PCS and BellSouth Telecommunications, Inc., d/b/a/ AT&T South Carolina, d/b/a AT&T Southeast	)	Docket No. 2007-255-C

AT&T SOUTH CAROLINA'S
MOTION TO DISMISS AND, IN THE ALTERNATIVE, ANSWER

BellSouth Telecommunications, Inc. d/b/a AT&T South Carolina ("AT&T South Carolina") submits the following Motion to Dismiss and, In the Alternative, Answer to the Petition for Adoption of the Interconnection Agreement ("Petition") filed by Nextel South Corp. ("Nextel"). In its Petition, Nextel seeks to adopt the interconnection agreement between AT&T South Carolina and Sprint. However, the basis upon which Nextel relies for its requested adoption is misplaced. First, the interpretation and enforcement of the merger conditions resulting from the Federal Communications Commission's ("FCC") AT&T Inc. and BellSouth Corp. merger proceeding are within the exclusive jurisdiction of the FCC. Second, Nextel is attempting to adopt an expired agreement and thus its adoption request does not comply with applicable FCC rules. Third, the requested adoption is premature because Nextel failed to abide by contractual obligations regarding dispute resolution found in its existing interconnection agreement with AT&T South Carolina. For these reasons, and as further explained below, pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure and S.C. Code Ann. §58-9-1110, the Commission should dismiss, as a matter of law, Nextel's Petition.

I. STANDARD FOR MOTION TO DISMISS

Dismissal of a Petition for relief is appropriate when the facts alleged in the Petition, even if assumed to be true, are not sufficient to constitute a claim upon which the Commission may grant the requested relief.[1] In addition to the allegations of the Petition, the Commission also may take notice of judicially cognizable facts (pursuant to S.C. Code Ann. §1-23-330 and S.C. Code Regs. 103-846.C) in resolving a motion to dismiss. In its Petition, Nextel refers to the existing interconnection agreement between AT&T South Carolina and Nextel as well as the interconnection agreement between AT&T South Carolina and Sprint that it seeks to adopt.[2] Those interconnection agreements are on file with and generally known by the Commission, and the Commission is capable of accurate and ready determination of the content and applicability of those documents to the instant matter. Accordingly, AT&T South Carolina requests that the Commission take judicial notice of the existing interconnection agreements between AT&T South Carolina and Nextel, and between AT&T South Carolina and Sprint.

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[1] *See* S.C. Rules Civ. Proc., Rule 12(b)(6); *Flateau v. Harrelson*, 355 S.C. 197, 202, 584 S.E.2d 413, 415-16 (Ct. App. 2003) (in deciding a motion to dismiss, "this Court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief,' and "[t]he trial court's grant of a motion to dismiss will be sustained if the facts alleged in the complaint do not support relief under any theory of law."). The Supreme Court of South Carolina has held that "[w]here . . . the dispute is not as to the underlying facts but as to the interpretation of the law, and development of the record will not aid in the resolution of the issue, it is proper to decide even novel issues on a motion to dismiss." *See Unisys Corp. v. South Carolina Budget and Control Bd.*, 346 S.C. 158, 165, 551 S.E.2d 263, 267 (2001).

[2] *See*, e.g., Petition at p. 4, ¶8; pp. 6-7, ¶13.

II. ARGUMENT REGARDING MOTION TO DISMISS

A. Nextel's Claims That are Based on AT&T South Carolina's Merger Commitments Should be Dismissed Because The FCC has Exclusive Juisdiction Over Those Merger Commitments.

In a letter to AT&T South Carolina dated May 18, 2007, and in its Petition, Nextel claims to rely upon merger commitments adopted and approved by the FCC in the BellSouth/AT&T "Merger Order"[3] as the basis for adoption of the ICA.[4] However, the question of whether these federal merger commitments (that were presented to and approved by the FCC) support Nextel's claims is a question that is within the exclusive jurisdiction of the FCC. The Commission, therefore, should dismiss the Petition, because Nextel cannot properly bring its claims before the Commission.

It is well settled that the Commission must possess jurisdiction over the parties, as well as the subject matter, in a proceeding[5] and that the Commission "possesses only the authority given it by the legislature."[6] Accordingly, the Commission should dismiss a request for relief if it asks the Commission to address matters over which it has no jurisdiction or if it seeks relief that the Commission is not authorized to grant. That is exactly what Nextel's Petition does because, as

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[3] Memorandum Opinion and Order, *In the Matter of AT&T, Inc. and BellSouth Corporation Application for Transfer of Control*, 22 F.C.C.R. 5662 at ¶222, Appendix F (March 26, 2007)("*Merger Order*").

[4] *See* Letter at 1, 2 (attached hereto as "Exhibit A"); Petition at p. 5, ¶10.

[5] *See, e.g., Mobley v. Bland*, 200 S.C. 448, 21 S.E. 2d 22 (1942) (to possess proper jurisdiction over the entirety of a case, the court must have both personal and subject matter jurisdiction).

[6] *South Carolina Cable Television Assoc. v. South Carolina Public Service Commission*, 313 S.C. 48, 437 S.E. 2d 38, 38 (1993); *See also*, City of Camden v. Public Service Commission of South Carolina, 283 S.C. 380, 323 S.E. 2d 519, 521 (1984) ([t]he Public Service Commission is a governmental body of limited power and jurisdiction, and has only such powers as are conferred upon it either expressly or by reasonably necessary implication by the General Assembly.").

explained below, neither state nor federal law grants the Commission jurisdiction over the Merger Commitments upon which Nextel relies.

The United States Supreme Court has held that the interpretation of a federal agency order, when issued pursuant to the federal agency's established regulatory authority, falls within the federal agency's jurisdiction.[7] This pronouncement clearly applies to the FCC's *Merger Order*. Accordingly, if Nextel desires interpretation or enforcement of any of the Merger Conditions, it must seek such interpretation or enforcement from the FCC.

The FCC made this clear when it explicitly reserved its own jurisdiction over the merger commitments that it approved in its *Merger Order*. Specifically, the FCC stated that "[f]or the avoidance of doubt, unless otherwise expressly stated to the contrary, ***all conditions and commitments*** proposed in this letter ***are enforceable by the FCC*** and would apply in the AT&T/BellSouth in-region territory, as defined herein, for a period of forty-two months from the Merger Closing Date and would automatically sunset thereafter."[8] Nowhere in the *Merger Order* does the FCC provide that the interpretation of merger commitments is to occur outside the FCC.

This is consistent with the fact that while the federal Act grants state Commissions authority to interpret and resolve *specific* issues of federal law (for instance, the requirements of Section 251 in the context of an arbitration proceeding initiated pursuant to Section 252), the Act does not grant state Commissions any *general* authority to resolve and enforce purported violations of federal law or FCC orders.[9] This is apparent from the reasoning of the Florida Commission in dismissing a claim that was based on an alleged violation of Section 222 of the

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7 *Serv. Storage & Transfer Co. v. Virginia*, 359 U.S. 171, 177 (1959).

8 *Merger Order* (Appendix F), p. 147 (emphases added).

9 *See* 47 U.S.C. § 251.

federal Act.[10] In dismissing that claim, the Florida Commission noted that it can construe and apply federal law "in order to make sure [its] decision under state law does not conflict" with federal law.[11] The Florida Commission, however, plainly and correctly noted that "[f]ederal courts have ruled that a state agency is not authorized to take administrative action based solely on federal statutes" and that "[s]tate agencies, as well as federal agencies, are only empowered by the statutes pursuant to which they are created."[12] Accordingly, in the *Sunrise Order*, the Florida Commission determined that while it can interpret and apply federal law to ensure that its decision under state law does not conflict with federal law, it cannot provide a remedy (federal or state) for a violation of federal law,[13] which is what the Petitioners are improperly seeking in this proceeding.

In the case before the Commission, Nextel's claims regarding the merger commitments are not based on state law. Instead, Nextel is asking a state agency to enforce Nextel's erroneous interpretation of federal merger commitments that are embodied in a federal agency's order. Consequently, the FCC alone possesses the jurisdiction to interpret and enforce the subject

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10 *See In re: Complaint by Supra Telecommunications and Information Systems, Inc., against BellSouth Telecommunications, Inc. regarding BellSouth's alleged use of carrier-to-carrier information*, Dkt. No. 030349-TP, Order No. PSC-03-1392-FOF-TP (Dec. 11, 2003) ("*Sunrise Order*").

11 *Id.* at 3-4.

12 *See, Sunrise Order* at 3 (citations omitted).

13 *Id.* at 5. The Florida Commission echoed these same principles in In re: Complaint against BellSouth Telecommunications, Inc. for alleged overbilling and discontinuance of service, and petition for emergency order restoring service, by IDS Telecom LLC, Dkt. No. 031125-TP, Order No. PSC-04-0423-FOF-TP (Apr. 26, 2004), wherein it dismissed a request by a CLEC to find that BellSouth violated federal law. Based on the Sunrise Order, the Florida Commission dismissed the federal law count of the complaint, holding "[s]ince Count Five relies solely on a federal statute as the basis for relief, we find it appropriate to dismiss Count Five." *Id.*

merger commitments. [14] For these reasons, the Commission should dismiss Nextel's claims that are based on the merger commitments.

B. Nextel's Claims That are Based on 47 U.S.C. §252(i) Should be Dimissed Because Nextel Did Not File Its Petition Within "A Reasonable Period Of Time" As Required By 47 C.F.R. §51.809(c).

Even if it were appropriate for Nextel to present its claims to the Commission (and, as explained above, it is not), the Commission still should dismiss them because Nextel's request to adopt an expired agreement is contrary to federal law.[15] Section 252(i) of the federal Act requires AT&T South Carolina to provide competing carriers with "any interconnection, service or network element" on the same terms contained in any approved and publicly-filed AT&T South Carolina contract. The FCC, however, has made it clear that this obligation is not unlimited. Instead, according to rules adopted by the FCC, AT&T South Carolina's obligation to provide such facilities and services to carriers like Nextel is limited to only a "reasonable period of time" after the original contract is approved.[16]

While the FCC did not adopt a definition of "reasonable period of time" in its rules, other commissions have found that attempting to adopt an agreement several months *before* its

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[14] While a state Commission may have certain enforcement authority regarding interconnection agreements that it approves pursuant to the federal Act, that is not the case in this proceeding. The merger commitments Nextel presents were not (and could not be) negotiated or arbitrated pursuant to Section 251 or 252 of the federal Act, and they are not found in an interconnection agreement that has been approved by the Commission. Instead, the merger commitments on which Nextel relies are a wholly independent voluntary commitments that are separate and apart from any Section 251 or 252 matter and are therefore not subject to state interpretation or enforcement.

[15] Pursuant to the authority cited above, AT&T South Carolina requests that the Commission take judicial notice of the Commission-approved AT&T South Carolina/Sprint ICA that Nextel seeks to adopt and which is the subject of its Petition.

[16] *See* 47 C.F.R. §51.809(c) ("[i]ndividual agreements shall remain available for use by telecommunications carriers pursuant to this section *for a reasonable period* of time after the approved agreement is available for public inspection under section 252(h) of the Act.") (emphasis added).

expiration does not satisfy the "reasonable period of time" requirement. In two cases from other jurisdictions, for example, a CLEC's request to adopt an interconnection agreement approximately ten months and approximately seven months, respectively, *before* each agreement's termination date was found not to have been made within a "reasonable period of time" as required by the FCC's rules.[17] In the first case, a CLEC requested adoption of an interconnection agreement approved in 1996. The CLEC sought adoption of the agreement in August 1998, when the agreement was by its terms set to expire on July 1, 1999, and the Virginia Commission denied the CLEC's request to adopt the agreement because of the limited amount of time remaining under it. Dissatisfied with that result, the CLEC petitioned the FCC for an order preempting the Virginia Commission's decision, but the FCC denied that petition.[18] Similarly, in the second case, the Maryland Commission held that it was unreasonable for the same CLEC to attempt to adopt a three-year interconnection agreement approximately two and a half years into its term.[19]

Nextel's Petition seeks to push the "reasonable period of time" envelope even further, and well beyond its breaking point, by seeking to adopt an agreement that, by its own terms, *has already expired.*[20] Furthermore, AT&T South Carolina and Sprint are currently engaged in arbitrating a new interconnection agreement. It would be highly inefficient and impractical to allow Nextel to adopt an antiquated and expired agreement when the Commission is considering

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17 *In Re: Global NAPs South, Inc.*, 15 FCC R'cd 23318 (August 5, 1999) ("Global NAPs One")(attached as Exhibit B); *In re: Notice of Global NAPs South, Inc.*, Case No. 8731 (Md. PSC July 15, 1999) ("Global NAPs Two")(attached as Exhibit C).

18 *See Global NAPs One.*

19 *See Global NAPs Two.*

20 The ICA was entered into on January 1, 2001, and was amended twice to extend the term to December 31, 2004.

AT&T South Carolina's request in the arbitration proceeding for the Commission to approve a new and updated agreement.

Nextel's requested adoption of the expired ICA falls far beyond the "reasonable period of time" requirement mandated by law. Accordingly, the Commission should determine, as a matter of law, that Nextel did not file its Petition for adoption of the ICA within a reasonable period of time as prescribed in 47 C.F.R. §51.809(c) and dismiss the Petition for failure to state a cause of action.

C. Nextel Failed To Comply With The Parties' Existing Agreement.

Nextel did not comply with the requisite steps for dispute resolution set forth in the parties' current interconnection agreement, and therefore its Petition is not properly before the Commission.[21] Nextel and AT&T South Carolina entered into an interconnection agreement with an effective date of June 14, 2001. That agreement is currently operational and its terms and conditions are binding. The agreement contains a provision addressing Nextel's right to adopt interconnection agreements AT&T South Carolina has entered into with other carriers. Specifically, under Article XVI titled "Modification of Agreement," the AT&T South Carolina/Nextel interconnection agreement provides in pertinent part:

> A. [AT&T South Carolina] shall make available, *pursuant to 47 USC §252 and the FCC rules and regulations regarding such availability*, to Carrier any interconnection, service, or network element provided under any other agreement filed and approved pursuant to 47 USC §252. The Parties shall adopt all rates, terms and conditions concerning such other interconnection, service, or network element and any other rates, terms and conditions that are interrelated or were negotiated in exchange for or in conjunction with the interconnection, service or network element being adopted. The adopted interconnection, service, or network element

[21] AT&T South Carolina requests that, in resolving this matter, the Commission take judicial notice of the "existing interconnection agreement between Nextel and AT&T [South Carolina]," referred to by Nextel in its Petition. Petition at pp. 6-7, ¶13.

> and agreement shall apply to the same states as such other agreement and for the identical term of such other agreement.

(emphasis added).

Nextel concedes in its Petition that AT&T South Carolina disagrees with Nextel's position,[22] yet Nextel unilaterally filed its Petition with the Commission on June 28, 2007. The AT&T South Carolina/Nextel agreement, however, contains provisions designed to assist the parties in resolving any and all disputes regarding terms and conditions in the agreement. The dispute resolution clause precludes Nextel from unilaterally filing an adoption in this disputed matter. Instead,

> Except as otherwise stated in this Agreement, if any dispute arises as to the interpretation of any provision of this Agreement or as to the proper implementation of this Agreement, the parties will initially refer the issue to the appropriate company representatives. If the issue is not resolved within 30 days, either party may petition the Commission for a resolution of the dispute. However, each party reserves the right to seek judicial review of any ruling made by the Commission concerning this Agreement.

Here, because Nextel disagreed with AT&T South Carolina, Nextel was contractually bound to follow the dispute resolution process contained in the parties' agreement, which it did not do. Accordingly, Nextel's Petition is improperly before the Commission and should be dismissed.

D. Conclusion

For the foregoing reasons, AT&T South Carolina respectfully requests that the Commission dismiss the Petition filed by Nextel in this Docket.

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22 *See*, e.g., Petition at p. 7, ¶¶14-15.

III. ANSWER

In the alternative, AT&T South Carolina responds to the Petition and states the following:

1. The allegations in Paragraph 1 of the Petition require no response from AT&T South Carolina.

2. The allegations in Paragraph 2 of the Petition require no response from AT&T South Carolina.

3. AT&T South Carolina admits the allegations in Paragraph 3 of the Petition.

4. AT&T South Carolina admits the allegations in Paragraph 4 of the Petition.

5. Appendix F of the FCC Order speaks for itself, and no response to Paragraph 5 of the Petition is required from AT&T South Carolina.

6. Section 252(i) of the Act speaks for itself, and no response to Paragraph 6 of the Petition is required from AT&T South Carolina.

7. AT&T South Carolina admits the allegations in Paragraph 7 of the Petition.

8. AT&T South Carolina admits the allegations in Paragraph 8 of the Petition.

9. AT&T South Carolina admits the allegations contained in the first three sentences of Paragraph 9 of the Petition. With regard to the allegations contained in the fourth sentence of Paragraph 9 of the Petition, AT&T South Carolina admits that Sprint has sought to extend the Sprint ICA three years from March 20, 2007, but AT&T South Carolina denies that Sprint's actions are reasonable and denies that Sprint is entitled to the extension it has sought.

10. AT&T South Carolina admits the allegations contained in the first sentence of Paragraph 10 of the Petition. AT&T South Carolina denies the characterization contained in the second sentence of Paragraph 10, and affirmatively asserts that AT&T South Carolina was under no requirement to execute the proposed adoption Agreement. AT&T admits that Exhibit B to the

Petition is comprised of copies of Nextel's May 18, 2007 letter, enclosed forms, and proposed adoption Agreement.

11. AT&T South Carolina is unsure what it intended by the phrase "execute the Sprint ICA as adopted by Nextel" and, therefore, AT&T South Carolina denies the allegations contained in Paragraph 11 of the Petition.

12. Paragraph 12 of the Petition contains legal arguments and conclusions as framed by Nextel and requires no response from AT&T South Carolina. To the extent the allegations contained in Paragraph 12 require any response from AT&T South Carolina, or are inconsistent with AT&T South Carolina's position, such allegations are denied.

13. Paragraph 13 of the Petition contains legal arguments and conclusions as framed by Nextel, and requires no response from AT&T South Carolina. To the extent the allegations contained in Paragraph 13 require any response from AT&T South Carolina, or are inconsistent with AT&T South Carolina's position, such allegations are denied.

14. AT&T South Carolina admits that a copy of AT&T South Carolina's May 30, 2007 letter is attached to the Petition as Exhibit C. AT&T South Carolina denies any remaining allegations contained in Paragraph 14 of the Petition to the extent that they are inconsistent with the May 30, 2007 letter.

15. Paragraph 15 of the Petition contains legal argument and conclusions as framed by Nextel and requires no response from AT&T South Carolina. To the extent the allegations contained in Paragraph 15 require any response from AT&T South Carolina, or are inconsistent with AT&T South Carolina's position, such allegations are denied.

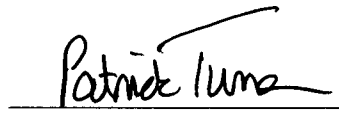
16. Paragraph 16 contains a statement regarding Nextel' belief and requires no response from AT&T South Carolina.

17. AT&T South Carolina denies each and every allegation in the Petition not expressly admitted herein, and demands strict proof thereof. AT&T denies that Nextel is entitled to the relief requested in the Prayer For Relief contained in the Petition. AT&T South Carolina affirmatively asserts that the Commission should dismiss the Petition.

WHEREFORE, AT&T South Carolina respectfully requests that the Commission dismiss Nextel's Petition and deny the relief requested by Nextel.

Respectfully submitted, this 10th day of August, 2007.

BELLSOUTH TELECOMMUNICATIONS, INC.,
d/b/a AT&T SOUTH CAROLINA



PATRICK W. TURNER
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687312

EXHIBIT A

Sprint
Together with NEXTEL

Sprint Nextel Access Solutions
Mailstop KSOPHA0310-3B372
6330 Sprint Parkway
Overland Park, KS 66251
Office: (913) 762-4133 Fax: (913) 523-0608
Mark.G.Felton@sprint.com

Mark G. Felton
Interconnection Solutions

May 18, 2007

Electronic and Overnight Mail

Ms. Kay Lyon, Lead Negotiator
AT&T Wholesale
4 AT&T Plaza, 311 S. Akard
Room 2040.03
Dallas, Texas 75202

Mr. Randy Ham, Assistant Director
AT&T Wholesale
8th Floor
600 North 19th Street
Birmingham, Alabama 35203

Ms. Lynn Allen-Flood
AT&T Wholesale – Contract Negotiations
675 W. Peachtree St. N.E.
34S91
Atlanta, GA 30375

Re: Nextel South Corp. and Nextel West Corp. (collectively "Nextel") adoption of "Interconnection Agreement By and Between BellSouth Telecommunications, Inc. and Sprint Communications Company Limited Partnership, Sprint Communications Company L.P., Sprint Spectrum L.P." dated January 1, 2001.

Dear Kay, Randy and Lynn:

The purpose of this letter is to notify BellSouth Telecommunications, Inc., d/b/a AT&T Southeast ("AT&T") that Nextel South Corp. and Nextel West Corp. (collectively "Nextel") is exercising its right to adopt the "Interconnection Agreement By and Between BellSouth Telecommunications, Inc. and Sprint Communications Company Limited Partnership, Sprint Communications Company L.P., Sprint Spectrum L.P." dated January 1, 2001 ("Sprint ICA") as amended, filed and approved in each of the 9-legacy BellSouth states[1]. Nextel is exercising its right

[1] For the purposes of this letter, the 9 legacy BellSouth states means: Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee.

pursuant to the FCC approved Merger Commitment Nos. 1 and 2 under "Reducing Transaction Costs Associated with Interconnection Agreements" as ordered by ("Merger Commitments") in the BellSouth – AT&T merger, WC Docket No. 06-74[2], and 47 U.S.C. § 252(i).

The Nextel entities are wholly owned subsidiaries of Sprint Nextel Corporation, as are Sprint Communications Company L.P. ("Sprint CLEC") and Sprint Spectrum L.P. ("Sprint PCS"). Although neither Nextel nor Sprint CLEC consider it either necessary or required by law, to avoid any potential delay regarding the exercise of Nextel's right to adopt the Sprint ICA, Sprint CLEC stands ready, willing and able to also execute the Sprint ICA as adopted by Nextel in order to expeditiously implement Nextel's adoption.

As AT&T is aware, all relevant state-specific differences among the 9 legacy BellSouth states are already contained within the Sprint ICA. Since the same state-specific terms are applicable to Nextel on a state by state basis, there are no "state-specific pricing and performance plans and technical feasibility" issues to prevent AT&T from immediately making the Sprint ICA available within each applicable state to Nextel pursuant to Merger Commitment No. 1. Likewise, since the Sprint ICA is already TRRO compliant and has an otherwise effective change of law provision, there is no issue to prevent AT&T from also making the Sprint ICA available to Nextel in each applicable state pursuant to Merger Commitment No. 2.

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[2] Merger Commitment No. 1 states:

> ***The AT&T/BellSouth ILECs shall make available to any requesting telecommunications carrier any entire effective interconnection agreement, whether negotiated or arbitrated that an AT&T/BellSouth ILEC entered into in any state in the AT&T/BellSouth 22-state ILEC operating territory***, subject to state-specific pricing and performance plans and technical feasibility, and provided, further, that an AT&T/BellSouth ILEC shall not be obligated to provide pursuant to this commitment any interconnection arrangement or UNE unless it is feasible to provide, given the technical, network, and OSS attributes and limitations in, and is consistent with the laws and regulatory requirements of, the state for which the request is made." (Emphasis added).

Merger Commitment No. 2 states:

> The AT&T/BellSouth ILECs shall not refuse a request by a telecommunications carrier to opt into an agreement on the aground that the agreement has not been amended to reflect changes of law, provided the requesting telecommunications carrier agrees to negotiate in good faith an amendment regarding such change of law immediately after it has opted into the agreement.

Enclosed are Nextel's completed AT&T forms with respect to Merger Commitment Nos. 1 and 2, with any language within such forms stricken to the extent such language is not contained within the Merger Commitments.

Also enclosed for AT&T's execution are two copies of an adoption document to implement Nextel's adoption of the Sprint ICA. Please sign and return both executed documents for receipt by me no later than Tuesday, May 29, 2007. Upon receipt I will have both documents executed on behalf of Nextel and return one fully executed adoption document to you. I will also cause to be filed with each of the 9 state commissions a copy of the fully executed adoption document along with a copy of the current 1,169 page Sprint ICA, as amended, which I will print off from your website at:

http://cpr.bellsouth.com/clec/docs/all_states/800aa291.pdf

To the extent notice may be deemed necessary pursuant to the existing interconnection agreements between Nextel and AT&T, please also consider this letter as Nextel's conditional notice to terminate the existing interconnection agreements between Nextel and AT&T in a given state upon acknowledgement by such state's commission that Nextel has adopted the Sprint ICA. Upon such acknowledgement, the existing interconnection agreement between Nextel and BellSouth Telecommunications, Inc. will then be considered terminated and superseded by the adopted Sprint ICA.

Should AT&T have any questions regarding Nextel's adoption of the Sprint ICA, please do not hesitate to call.

Thank you in advance for your prompt attention to this matter.

Sincerely,

Mark G. Felton

Enclosures

CC: Mr. Joseph M. Chiarelli, Counsel for Nextel
Mr. William R. Atkinson, Counsel for Nextel
Mr. Jim Kite, Interconnection Solutions

TO: **Contract Management**
311 S Akard
Four AT&T Plaza, 9th floor
Dallas, TX 75202
Fax: 1-800-404-4548

May 18, 2007

RE: ~~Request~~ Notice to Port Interconnection Agreement

Director – Contract Management:

Pursuant to ICA Merger Commitment 7.1 under "Reducing Transaction Costs Associated with Interconnection Agreements," effective December 29, 2006, associated with the merger of AT&T Inc. and BellSouth Corp. ("ICA Merger Commitment 7.1"), Nextel South Corp. & Nextel West Corp. ("Nextel") ("Carrier") ~~desires to~~ exercise its right to port the existing Interconnection Agreement between BellSouth Telecom., Inc. ("AT&T") and Sprint Com. Co. L.P. & Sprint Spectrum L.P. in the state of AL, FL, GA, KY, LA, to the state of MS, NC, SC & TN and, by this notice, requests AT&T to ~~initiate a review to~~ support this ~~request~~ exercised right. Carrier understands that pursuant to ICA Merger Commitment 7.1, porting of the Interconnection Agreement is subject to a variety of conditions including (without limitation) technical feasibility and state-specific pricing, terms and conditions. Carrier understands AT&T will reply in writing when its review of this porting ~~request~~ notice has been completed.

	CARRIER NOTICE CONTACT INFO*
NOTICE CONTACT NAME	
NOTICE CONTACT TITLE	Please see attached
STREET ADDRESS	
ROOM OR SUITE	
CITY, STATE, ZIP CODE	
E-MAIL ADDRESS	
TELEPHONE NUMBER	
FACSIMILE NUMBER	
STATE OF INCORPORATION	Delaware
TYPE OF ENTITY (corporation, limited liability company, etc.)	Corporation

~~Enclose proof of certification for state requested.~~

~~Enclose ***documentation from Telcordia*** as confirmation of ACNA.~~

~~Enclose ***documentation from NECA*** as confirmation of OCN(s).~~

~~Enclose ***verification*** of type of entity and registration with Secretary of State.~~

AT&T already has any necessary, applicable information in its systems.

Form completed and submitted by: Nextel

Contact number: Jim Kite @ 913-762-4281

*** All requested carrier notice contact information and documentation are required. Be aware that the failure to provide accurate and complete information may result in return of this form to you and a delay in processing your request.**

Nextel South Corp. and Nextel West Corp. (collectively "Nextel"), and NPCR, Inc. d/b/a Nextel Partners ("Nextel Partners")
Carrier Contact Notice Information Attachment

All AT&T notices to Nextel or Nextel Partners are to be sent to the same person(s) at the same addresses as identified in the interconnection agreement between BellSouth Telecommunications, Inc. and Sprint Communications Company L.P. a/k/a Sprint Communications Company Limited Partnership and Sprint Spectrum L.P. (collectively "Sprint") dated January 1, 2001 ("the Sprint ICA"). Nextel and Nextel Partners understand Sprint is in the process of preparing a separate written notice to likewise provide AT&T the following updated information regarding the sending of any notices pursuant to the Sprint ICA:

For Sprint, Nextel or Nextel Partners:

Manager, ICA Solutions
Sprint
P. O. Box 7954
Shawnee Mission, Kansas 66207-0954

or

Manager, ICA Solutions
Sprint
KSOPHA0310-3B268
6330 Sprint Parkway
Overland Park, KS 66251
(913) 762-4847 (overnight mail only)

With a copy to:

Legal/Telecom Mgmt Privacy Group
P O Box 7966
Overland Park, KS 66207-0966

or

Legal/Telecom Mgmnt Privacy Group
Mailstop: KSOPKN0214-2A568
6450 Sprint Parkway
Overland Park, KS 66251
913-315-9348 (overnight mail only)

TO: **Contract Management**
311 S Akard
Four AT&T Plaza, 9th floor
Dallas, TX 75202
Fax: 1-800-404-4548

May 18, 2007

Notice

RE: ~~Request~~ to Adopt Interconnection Agreement

Director – Contract Management:

Pursuant to ICA Merger Commitment 7.2 under "Reducing Transaction Costs Associated with Interconnection Agreements," ordered by the FCC effective December 29, 2006 in connection with the merger of AT&T Inc. and BellSouth Corporation ("ICA Merger Commitment 7.2"), Nextel South Corp. & Nextel West Corp. ("Nextel") ("Carrier") ~~desires to~~ exercise its right to opt into the existing Interconnection Agreement ("ICA") between BellSouth Telecomm, Inc. ("AT&T") and Sprint Com. Co. L.P. & Sprint Spectrum L.P. in the state of AL, FL, GA, KY, LA MS, NC, SC & TN. ~~Carrier understands that its request to opt into the ICA is subject to applicable requirements governing this process as set forth in Section 252(i) and Rule 51.809. Moreover,~~ pursuant to ICA Merger Commitment 7.2, if the Agreement has not been amended to reflect changes of law, Carrier acknowledges that it is obligated to negotiate in good faith the execution of an Amendment regarding such change of law and agrees to complete said execution within 30 days after it has opted into the ICA. AT&T will reply in writing to this formal ~~request.~~ notice

	CARRIER NOTICE CONTACT INFO*
NAME, TITLE	
STREET ADDRESS	Please see Attached
ROOM OR SUITE	
CITY, STATE, ZIP CODE	
E-MAIL ADDRESS	
TELEPHONE NUMBER	
FACSIMILE NUMBER	
STATE OF INCORPORATION	Delaware
TYPE OF ENTITY (corporation, limited liability company, etc.)	Corporation

~~Enclose proof of certification for state requested.~~

~~Enclose ***documentation from Telcordia*** as confirmation of ACNA.~~

~~Enclose ***documentation from NECA*** as confirmation of OCN(s).~~

~~Enclose ***verification*** of type of entity and registration with Secretary of State.~~

AT&T already has any necessary, applicable information in its systems.

Form completed and submitted by: Nextel

Contact number: JimKite@913-762-4281

*** All requested carrier contact information and documentation are required. Be aware that the failure to provide accurate and complete information may result in return of this form to you and a delay in processing your request.**

Nextel South Corp. and Nextel West Corp. (collectively "Nextel"), and NPCR, Inc. d/b/a Nextel Partners ("Nextel Partners")
Carrier Contact Notice Information Attachment

All AT&T notices to Nextel or Nextel Partners are to be sent to the same person(s) at the same addresses as identified in the interconnection agreement between BellSouth Telecommunications, Inc. and Sprint Communications Company L.P. a/k/a Sprint Communications Company Limited Partnership and Sprint Spectrum L.P. (collectively "Sprint") dated January 1, 2001 ("the Sprint ICA"). Nextel and Nextel Partners understand Sprint is in the process of preparing a separate written notice to likewise provide AT&T the following updated information regarding the sending of any notices pursuant to the Sprint ICA:

For Sprint, Nextel or Nextel Partners:

Manager, ICA Solutions
Sprint
P. O. Box 7954
Shawnee Mission, Kansas 66207-0954

or

Manager, ICA Solutions
Sprint
KSOPHA0310-3B268
6330 Sprint Parkway
Overland Park, KS 66251
(913) 762-4847 (overnight mail only)

With a copy to:

Legal/Telecom Mgmt Privacy Group
P O Box 7966
Overland Park, KS 66207-0966

or

Legal/Telecom Mgmnt Privacy Group
Mailstop: KSOPKN0214-2A568
6450 Sprint Parkway
Overland Park, KS 66251
913-315-9348 (overnight mail only)

By and Between

BellSouth Telecommunications, Inc. d/b/a
AT&T Southeast

And

Nextel South Corp.
(For the States of Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, Tennessee, and South Carolina)
And
Nextel West Corp.
(For the State of Kentucky)

AGREEMENT

THIS AGREEMENT is made by and between BellSouth Telecommunications, Inc., d/b/a AT&T Southeast ("AT&T"), a Georgia Corporation, having offices at 675 W. Peachtree Street, Atlanta, Georgia, 30375, on behalf of itself and its successors and assigns, and Nextel South Corp. ("Nextel South"), a Delaware Corporation, and Nextel West Corp. ("Nextel West"), a Delaware Corporation (Nextel South and Nextel West are collectively referred to herein as "Nextel"), and shall be deemed effective in the respective states of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Tennessee and South Carolina as of the date it is filed with each state Commission or applicable Authority in such states ("the Effective Date").

WHEREAS, the Telecommunications Act of 1996 (the "Act") was signed into law on February 8, 1996; and

WHEREAS, pursuant to section 252(i) of the Act, AT&T is required to make available any interconnection agreement filed and approved pursuant to 47 U.S.C. § 252; and

WHEREAS, pursuant to Merger Commitment Nos. 1 and 2 under "Reducing Transaction Costs Associated with Interconnection Agreements" as required by the Federal Communications Commission in its AT&T, Inc. – BellSouth Corporation Order, i.e., *In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control,* Memorandum Opinion and Order, Ordering Clause ¶ 227 at page 112 and Appendix F at page 149, WC Docket No. 06-74 (Adopted: December 29, 2006, Released: March 26, 2007), AT&T is also required to make available any entire effective interconnection agreement that an AT&T/BellSouth ILEC has entered in any state in the AT&T/BellSouth 22-state operating territory; and

WHEREAS, Nextel has exercised its right to adopt in its entirety the effective interconnection agreement between Sprint Communications Company Limited Partnership a/k/a Sprint Communications Company L.P. ("Sprint CLEC") Sprint Spectrum, L.P. d/b/a Sprint PCS ("Sprint PCS") and BellSouth Telecommunications, Inc. Dated January 1, 2001 for the state(s) of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee ("the Sprint ICA").

WHEREAS, Nextel is a wholly owned subsidiary of Sprint Nextel Corporation, as are Sprint CLEC and Sprint PCS and, although neither Nextel nor Sprint CLEC consider it either necessary or required by law, to avoid any potential delay regarding the exercise of Nextel's adoption of the Sprint ICA, Sprint CLEC is ready, willing and able to also execute this Agreement as an accommodation party.

NOW THEREFORE, in consideration of the promises and mutual covenants of this Agreement, Nextel and AT&T hereby agree as follows:

1. Nextel and AT&T shall adopt in its entirety the 1,166 page Sprint ICA, a copy of which is attached hereto as Exhibit A, and is also available for public view on the AT&T website at:

http://cpr.bellsouth.com/clec/docs/all_states/800aa291.pd

2. The term of this Agreement shall be from the Effective Date as set forth above and shall coincide with any expiration or extension of the Sprint ICA.

3. Nextel and AT&T shall accept and incorporate into this Agreement any amendments to the Sprint ICA executed as a result of any final judicial, regulatory, or legislative action.

4. Every notice, consent or approval of a legal nature, required or permitted by this Agreement shall be in writing and shall be delivered either by hand, by overnight courier or by US mail postage prepaid (and email to the extent an email has been provided for notice purposes) to the same person(s) at the same addresses as identified in the Sprint ICA, including any revisions to such notice information as may be provided by Sprint CLEC and Sprint PCS from time to time, and will be deemed to equally apply to Nextel unless specifically indicated otherwise in writing.

IN WITNESS WHEREOF, the Parties have executed this Agreement the day and year written below.

BellSouth Telecommunications, Inc. d/b/a AT&T Southeast

By: _____

Name: _____

Title: _____

Date: _____

Nextel South Corp. and Nextel West Corp.

By: _____

Name: _____

Title: _____

Date: _____

Sprint Communications Company Limited Partnership a/k/a Sprint Communications Company L.P. Sprint Spectrum L.P., as an Accommodating Party

By: _____

Name: _____

Title: _____

Date: _____

EXHIBIT B

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Global NAPs South, Inc. Petition for	)	CC Docket No. 99-198
Preemption of Jurisdiction of the Virginia	)	
State Corporation Commission Regarding	)	
Interconnection Dispute with	)	
Bell Atlantic-Virginia, Inc.	)	

MEMORANDUM OPINION AND ORDER

Adopted: August 5, 1999 **Released: August 5, 1999**

By the Deputy Chief, Common Carrier Bureau:

I. INTRODUCTION

1. This *Memorandum Opinion and Order* addresses the petition of Global NAPs South, Inc. (GNAPs) for preemption of jurisdiction of the Virginia State Corporation Commission (Virginia Commission) with respect to an arbitration proceeding involving GNAPs and Bell Atlantic-Virginia, Inc. (Bell Atlantic).[1] The Commission placed GNAPs' preemption petition on public notice on May 24, 1999.[2] Ameritech, Bell Atlantic, Connect!, Cox Communications, Inc., and the Virginia Commission filed comments, and GNAPs filed a reply.

2. GNAPs seeks preemption of the Virginia Commission pursuant to section 252(e)(5) of the Communications Act of 1934, as amended.[3] Section 252(e)(5) authorizes the

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[1] Global NAPs South, Inc. Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission, CC Docket No. 99-198, filed with the Commission on May 19, 1999 (Virginia Petition).

[2] *Pleading Cycle Established for Comments on Global NAPs South, Inc. Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Dispute with Bell Atlantic - Virginia*, Public Notice, CC Docket No. 99-198, DA 99-984 (rel. May 24, 1999) (Public Notice). The Public Notice established a deadline for comment of June 8, 1999, and a deadline for reply comments of June 17, 1999. On May 26, 1999, GNAPs requested that the Commission extend the comment and reply dates by one week because the Virginia Commission was not served with the Virginia Petition until May 26, 1999. On June 3, 1999, the Common Carrier Bureau released an order extending the deadline for comment to June 15, 1999, and the deadline for reply comments to June 24, 1999. *In the Matter of Global NAPs South, Inc. Petition for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Dispute with Bell Atlantic-Virginia*, Order, CC Docket No. 99-198, DA 99-1090 (rel. Jun. 3, 1999).

[3] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act), *codified at* 47 U.S.C. §§ 151 *et seq.* Hereafter, all citations to the 1996 Act will be to the 1996 Act as it is codified in the United States Code. The 1996 Act amended the Communications Act of 1934. We will refer to the Communications Act of 1934,

Commission to preempt a state commission in any proceeding or matter in which the state commission "fails to act to carry out its responsibility" under section 252.[4] Section 252 sets out the procedures by which telecommunications carriers may request and obtain interconnection, resale services or unbundled network elements from an incumbent local exchange carrier (LEC).[5] For the reasons discussed below, we find that the Virginia Commission has not "failed to act" within the meaning of our rules implementing section 252(e)(5).[6] We therefore deny GNAPs' petition and do not preempt the Virginia Commission.

II. BACKGROUND

A. Statutory Provisions

3. Congress adopted sections 251 and 252 of the 1996 Act to foster local exchange competition by imposing certain requirements on incumbent LECs that are designed to facilitate the entry of competing telecommunications carriers. Section 251 describes the various requirements designed to promote market entry, including incumbent LECs' obligations to provide requesting telecommunications carriers interconnection, unbundled network elements, and services for resale.[7] Section 252 sets forth the procedures by which telecommunications carriers may request and obtain interconnection, unbundled network elements, and services for resale from an incumbent LEC pursuant to section 251.[8] Specifically, sections 252(a) and (b) establish a scheme whereby telecommunications carriers may obtain interconnection with the incumbent according to agreements fashioned through (1) voluntary negotiations between the

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as amended, as "the Communications Act" or "the Act."

[4] 47 U.S.C. § 252(e)(5).

[5] *See generally* 47 U.S.C. § 252.

[6] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 16122-16132 (1996) (*Local Competition Order*), *aff'd in part and vacated in part sub nom., Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *petition for cert. granted*, Nos. 97-829, 97-830, 97-831, 97-1097, 97-1099, and 97-1141 (U.S. Jan. 26, 1998) (collectively *Iowa Utils. Bd. v. FCC*), *aff'd in part and remanded, AT&T Corp., et al. v. Iowa Utils. Bd. et al.*, 119 S.Ct. 721 (1999); Order on Reconsideration, 11 FCC Rcd 13042 (1996), Second Order on Reconsideration, 11 FCC Rcd 19738 (1996); Third Order on Reconsideration and Further Notice of Proposed Rulemaking, FCC 97-295 (rel. Aug. 18, 1997), *further recons. pending*; *see also* 47 C.F.R. §§ 51.801(b), 51.803(b).

[7] *See generally* 47 U.S.C. § 251(c). For purposes of this order, the interconnection, access to unbundled elements, services for resale and other items for which incumbent LECs have a duty to negotiate pursuant to section 251(c)(1) are sometimes referred to collectively as "interconnection."

[8] *See generally* 47 U.S.C. § 252.

carriers, (2) mediation by state commissions, or (3) arbitration by state commissions.[9] These interconnection agreements must then be submitted for approval to the appropriate state commission.[10]

4. In addition, section 252(i) provides another means for establishing interconnection. Pursuant to section 252(i), local exchange carriers must "make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement."[11] Negotiation is not required to implement a section 252(i) opt-in arrangement; indeed, neither party may alter the terms of the underlying agreement. Although there is no arbitration or negotiation as identified in section 252(e)(1) for the state to approve,[12] states may adopt "procedures for making agreements available to requesting carriers on an expedited basis."[13] As the Commission observed three years ago, a party seeking interconnection pursuant to section 252(i) "need not make such requests pursuant to the procedures for initial section 251 requests, but shall be permitted to obtain its statutory rights on an expedited basis."[14] Otherwise, the "non-discriminatory, pro-competition purpose of section 252(i) would be defeated were requesting carriers required to undergo a lengthy negotiation and approval process pursuant to section 251."[15]

5. Section 252(e)(5) directs the Commission to assume responsibility for any proceeding in which the state commission "fails to act to carry out its responsibility" under section 252:

> (5) COMMISSION TO ACT IF STATE WILL NOT ACT.—If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an

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9 *See* 47 U.S.C. § 252(a), (b).

10 47 U.S.C. § 252(e)(1).

11 47 U.S.C. § 251(i).

12 47 U.S.C. § 252(e)(1) ("Any interconnection agreement adopted by negotiation or arbitration shall be submitted to the State commission"); *see also Local Competition Order*, 11 FCC Rcd at 16141, ¶ 1321 (indicating that carriers "seeking interconnection, network elements, or services pursuant to section 252(i) need not make such requests pursuant to the procedures for initial section 252 requests").

13 *Local Competition Order*, 11 FCC Rcd at 16141, ¶ 1321.

14 *Id.* An expedited process for section 252(i) opt-ins would necessarily be substantially quicker than the time frame for negotiation, and approval, of a new interconnection agreement since the underlying agreement has already been subject to state review under section 252(e).

15 *Id.*

order within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.[16]

B. Commission's Rules

6. The *Local Competition Order* adopted "interim procedures" to exercise preemption authority under section 252(e)(5) in order to "provide for an efficient and fair transition from state jurisdiction should [the Commission] have to assume the responsibility of the state commission . . . ."[17] The *Local Competition Order* concluded that the Commission would not take an "expansive view" of what constitutes a state commission's "failure to act" for purposes of section 252(e)(5).[18] Rather, the *Local Competition Order* interpreted "failure to act" to mean a state's failure to complete its duties in a timely manner. The *Local Competition Order* limited the instances under which Commission preemption pursuant to section 252(e)(5) is appropriate to "when a state commission fails to respond, within a reasonable time, to a request for mediation or arbitration, or fails to complete arbitration within the time limits of section 252(b)(4)(c)."[19] Under the Commission's rules, "[t]he party seeking preemption [pursuant to section 252(e)(5)] must prove that the state [commission] has failed to act to carry out its responsibilities under section 252 of the Act."[20]

C. Procedural History

7. On July 2, 1998, GNAPs asked Bell Atlantic to commence negotiations for interconnection.[21] The parties subsequently attempted to negotiate the terms of an interconnection agreement.[22] In August 1998, GNAPs concluded that it could meet its

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16 47 U.S.C. § 252(e)(5).

17 *Local Competition Order*, 11 FCC Rcd at 16127, ¶ 1283.

18 *Id.* at 16128, ¶ 1285.

19 *Id.* at 16128, ¶ 1285. *See also* 47 C.F.R. § 51.801(b); *In the Matter of Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.'s Petition for Arbitration with Ameritech Illinois Before the Illinois Commerce Commission, with BellSouth Before the Georgia Public Service Commission, and with GTE South Before the Public Service Commission of South Carolina*, Order, 13 FCC Rcd 1755, 1758-1759, ¶ 5 (1997) (*Low Tech Order*), *recon. denied*, CC Docket Nos. 97-163, 97-164, 97-165, FCC 99-71 (rel. Apr. 13, 1999). The Commission has indicated that there is no "failure to act" when an interconnection agreement is "deemed approved" under section 252(e)(4) as a result of state commission inaction. *Local Competition Order*, 11 FCC Rcd at 16128, ¶ 1285; 47 U.S.C. § 252(e)(4).

20 47 C.F.R. § 51.803(b); *see also Local Competition Order*, 11 FCC Rcd at 16128, ¶ 1285.

21 Virginia Petition at 1.

22 *Id.*

interconnection needs by opting-into a 1996 agreement between Bell Atlantic and MFS Intelenet (MFS) pursuant to section 252(i).[23] As a result, GNAPs advised Bell Atlantic that GNAPs wanted to interconnect with Bell Atlantic on the same terms as contained in Bell Atlantic's 1996 agreement with MFS (1996 MFS Agreement).[24] According to GNAPs, Bell Atlantic refused to honor GNAPs' right to opt-into the 1996 MFS Agreement without modifications.[25]

8. On November 16, 1998, GNAPs filed a petition for arbitration with the Virginia Commission,[26] pursuant to section 252(b) of the Act.[27] On November 25, 1998, GNAPs filed a motion requesting expedited treatment of its petition and further requesting that Bell Atlantic

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[23] *Id.* Section 252(i) provides that: "[a] local exchange carrier shall make available any interconnection service, or network element provided under an agreement approved under [section 252] to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." 47 U.S.C. § 252(i). At the time GNAPs first sought to interconnect with Bell Atlantic, carriers were subject to the Eighth Circuit's interpretation of section 252(i). As a result, requesting carriers such as GNAPs were required to opt-into an existing contract as a whole rather than "pick and choose" different elements from different existing contracts. *Iowa Utils. Bd.*, 120 F.3d at 800-801. The Supreme Court since overturned the Eighth Circuit's interpretation of section 252(i) and reinstated the Commission's "pick and choose" approach. *AT&T Corp.*, 119 S.Ct. at 738; *see generally* 47 C.F.R. § 51.809.

[24] Virginia Petition at 1.

[25] *Id.* at 2. If a local exchange carrier fails to recognize the rights of an opt-in carrier, that carrier may seek expedited relief from this Commission pursuant to section 208. *Local Competition Order*, 11 FCC Rcd at 16141, ¶ 1321; 47 U.S.C. § 208. In this case, GNAPs decided to pursue arbitration pursuant to section 252(b) and during the arbitration proceeding that followed, sought to enter into an interconnection agreement with Bell Atlantic identical to the 1996 MFS Agreement. Bell Atlantic asserts in this proceeding that GNAPs has no right to opt-into provisions relating to reciprocal compensation, arguing that section 252(i) only permits carriers to opt-into provisions of interconnection agreements that are based on the requirements of section 251. Bell Atlantic Comments at 4. We reject Bell Atlantic's argument, as our rules establish only two limited exceptions to the right of carriers to opt-into an interconnection agreement. *See* 47 C.F.R. § 51.809(b).

[26] *Petition of Global NAPs South, Inc. for Arbitration of Unresolved Issues from Interconnection Negotiations with Bell Atlantic-Virginia, Inc. Pursuant to Section 252 of the Telecommunications Act of 1996*, Final Order, No. PUC980173 (Virginia Commission Apr. 2, 1999) at 1 (Virginia Final Order) (filed as an attachment to Virginia Petition).

[27] The procedural history of this proceeding is complex because it involves both opt-in and arbitration attempts by GNAPs. GNAPs should have been able to exercise its opt-in right under section 252(i) on an expedited basis. *Local Competition Order*, 11 FCC Rcd at 16141, ¶ 1321. Thus, for example, a carrier should be able to notify the local exchange carrier that it is exercising this right by submitting a letter to the local exchange carrier identifying the agreement (or the portions of an agreement) it will be using and to whom invoices, notices regarding the agreement, and other communication should be sent. In such circumstances, the carrier opting-into an existing agreement takes all the terms and conditions of that agreement (or the portions of that agreement), including its original expiration date.

provide GNAPs interconnection on an interim basis.[28] On December 11, 1998, Bell Atlantic filed its response to the GNAPs arbitration petition and motion.[29]

9. In a January 29, 1999 order, the Virginia Commission determined that there was no need to hold an evidentiary hearing in the GNAPs/Bell Atlantic arbitration proceeding, having found that the issues raised by the parties presented only legal questions.[30] In the same order, however, the Virginia Commission encouraged the parties to supplement their pleadings in order to further clarify their positions on the issues, and to address how the Supreme Court's decision in *AT&T Corp. v. Iowa Utilities Board* might impact the arbitration of unresolved issues between GNAPs and Bell Atlantic.[31]

10. On February 10, 1999, Bell Atlantic filed a supplemental brief in response to the January 29, 1999 order. [32] According to the Virginia Commission's April 2, 1999 final order, Bell Atlantic argued in its supplemental brief that the Supreme Court's reinstatement of section 51.809 of the Commission's rules did not entitle GNAPs to adopt Bell Atlantic's 1996 MFS Agreement.[33] On February 10, 1999, GNAPs also filed a supplemental brief in response to the January 29, 1999 order.[34] According to the Virginia Commission's April 2, 1999 final order, GNAPs argued in its supplemental brief that it was entitled to reciprocal compensation for terminating Internet Service Provider (ISP) traffic; that it should be able to opt-into the 1996 MFS Agreement for a full three-year term; and that section 51.809 of the Commission's rules did not prevent GNAPs from adopting Bell Atlantic's 1996 MFS Agreement.[35] GNAPs further asserted that Bell Atlantic acted in bad faith by not permitting it to opt-into the 1996 MFS Agreement in August 1998.[36]

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28 Virginia Final Order at 2.

29 *Id.* at 1.

30 *Id.* at 2.

31 *Id. See generally AT&T Corp.*, 119 S.Ct. at 738.

32 Virginia Final Order at 2.

33 *Id.* at 2-3. *See also* 119 S.Ct. at 738. Section 51.809 of the Commission's rules describes the availability of provisions of existing interconnection agreements to other telecommunications carriers under section 252(i) of the Act. 47 C.F.R. § 51.809.

34 Virginia Final Order at 2.

35 *Id.* at 3-4.

36 *Id.* at 3.

11. On February 26, 1999, the Commission released its *ISP Compensation Ruling and NPRM*.[37] On March 11, 1999, the Virginia Commission released an order scheduling oral argument so that the parties could address what effect, if any, the Commission's *ISP Compensation Ruling and NPRM* and the Supreme Court's decision might have on the resolution of the GNAPs/Bell Atlantic arbitration proceeding.[38] Oral argument was held on March 25, 1999.[39]

12. On April 2, 1999, the Virginia Commission issued its final order in the GNAPs/Bell Atlantic arbitration proceeding. In its final order, the Virginia Commission acknowledged that the 1996 MFS Agreement would terminate on July 1, 1999 and that any carrier opting-into this agreement would necessarily find themselves bound by this termination date, unless otherwise negotiated.[40] The Virginia Commission noted that in light of the very limited time remaining under the 1996 MFS Agreement, there would likely be only thirty days, at most, from the time an adopted GNAPs/Bell Atlantic agreement based on the 1996 MFS Agreement would be approved until Bell Atlantic could terminate the agreement pursuant to the contract terms.[41] Thus, citing both the maxim "equity will not do a vain or useless thing," and the "reasonable time" language in section 51.809(c) of the Commission's rules, the Virginia Commission denied GNAPs' petition to adopt the 1996 MFS Agreement and dismissed the GNAPs/Bell Atlantic arbitration proceeding.[42]

13. On April 21, 1999, GNAPs filed a petition for reconsideration of the April 2, 1999 final order with the Virginia Commission.[43] Under the Virginia Commission's rules, an order becomes final within 21 days after entry, unless modified or vacated in a response to a petition for reconsideration or on the Virginia Commission's own motion.[44] The Virginia Commission

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37 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 Inter-Carrier Compensation for ISP-Bound Traffic*, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket 99-68 (rel. Feb. 26, 1999) (*ISP Compensation Ruling and NPRM*).

38 Virginia Final Order at 4-5.

39 *Id.* at 5.

40 *Id.*

41 *Id.* at 5-6.

42 *Id.* Section 51.809(c) of the Commission's rules provides that "[I]ndividual interconnection, service, or network element arrangements shall remain available for use by telecommunications carriers . . . for a reasonable period of time after the approved agreement is available for public inspection under section 252(f) of the Act." 47 C.F.R. § 51.809(c).

43 Virginia Petition at 6.

44 *Id.*

elected not to act in response to GNAPs' petition for reconsideration and therefore allowed its April 2, 1999 order to become final.[45]

D. GNAPs' Petition for Preemption of Jurisdiction

14. GNAPs requests in its petition that the Commission "preempt the jurisdiction" of the arbitration proceeding it requested before the Virginia Commission, pursuant to section 252(e)(5).[46] GNAPs alleges that the April 2, 1999 final order is a "plain failure of the [Virginia Commission] to fulfill its responsibilities under the Act."[47] GNAPs does not allege, however, that the Virginia Commission "failed to act" upon its arbitration request in a timely manner, nor that the April 2, 1999 final order was untimely rendered.[48]

15. GNAPs alleges that, without identifying any provision of the 1996 MFS Agreement that was technically infeasible or impractical, or any rate in that agreement that was based on outdated cost analyses, the Virginia Commission found that the 1996 MFS Agreement was too old to be opted-into and denied and dismissed GNAPs' arbitration petition.[49] GNAPs maintains that it does not know whether the Virginia Commission's April 2, 1999 final order is the product of confusion regarding whether or not its efforts to opt-into the 1996 MFS Agreement were subject to arbitration; confusion regarding the jurisdictional status of ISP-bound calls; uncertainty following the Supreme Court's decision in *AT&T Corp. v. Iowa Utilities Board*; or some other misunderstanding.[50] GNAPs argues, however, that the effect of the April 2, 1999 final order is to put them "back at ground zero" and leave them without an interconnection agreement nearly a year after their negotiations with Bell Atlantic began.[51] In light of this outcome, GNAPs alleges that the Virginia Commission has "failed to act to carry out its responsibilities under section 252 of the Act."[52]

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45 *Id.*

46 *Id.* at 1.

47 *Id.* at 6.

48 State commissions are required to respond to a request for arbitration within a "reasonable time," *Local Competition Order*, 11 FCC Rcd 16128, ¶ 1285; 47 C.F.R. § 51.801(b), and to conclude an arbitration no later than nine months after the date on which the incumbent LEC receives a request for negotiation under section 252. 47 U.S.C. § 252(b)(4)(C).

49 Virginia Petition at 5.

50 *Id.* at 6.

51 *Id.*

52 *Id.* at 7. *See also* 47 C.F.R. § 51.803(b).

III. DISCUSSION

16. Section 252(e)(5) directs the Commission to preempt the jurisdiction of a state commission in any proceeding or matter in which a state commission "fails to act to carry out its responsibility under [section 252]."[53] Here, the Virginia Commission has not "failed to act" under Commission rules implementing section 252(e)(5) solely because it has issued a decision denying GNAPs the terms and conditions on which it sought to interconnect with Bell Atlantic.[54] As noted above, in the *Local Competition Order*, the Commission concluded that it would not take an "expansive view" of what constitutes a state commission's failure to act, noting its belief that "states [would] meet their responsibilities and obligations under the 1996 Act."[55] Therefore, the Commission determined that it would preempt a state commission's jurisdiction for "failure to act" under section 252(e)(5) only in those "instances where a state commission fails to respond, within a reasonable time, to a request for mediation or arbitration, or fails to complete arbitration within the time limits of section 252(b)(4)(C)."[56] Thus, under the Commission's current rules, a state commission does not "fail to act" when it responds to a request for arbitration but subsequently dismisses or denies an arbitration within the nine month time limit in section 252(b)(4)(C).

17. Applying the Commission's rules in this instance, we find that the Virginia Commission responded to GNAPs' request for arbitration by quickly initiating proceedings. The Virginia Commission established a series of pleading cycles and afforded the parties opportunities to address the impact of the Supreme Court's decision in *AT&T Corp. v. Iowa Utilities Board* and the Commission's *ISP Compensation Ruling and NPRM*. In addition, an oral argument was held on March 25, 1999.

18. Moreover, GNAPs does not claim that the Virginia Commission acted outside of any statutory time frame.[57] Although GNAPs contends that the Commission "failed to act to carry out its responsibilities under section 252 of the Act," we note that the Virginia Commission issued its April 2, 1999 final order within nine months after Bell Atlantic received GNAPs' request for interconnection, consistent with the requirements of section 252(b)(4)(C). According to the Virginia Commission, GNAPs presented no evidence regarding terms for an

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53 47 U.S.C. § 252(e)(5).

54 *See* Virginia Commission Comments at 1.

55 *Local Competition Order*, 11 FCC Rcd at 16128, ¶ 1285.

56 47 C.F.R. § 51.801(b). *See also Local Competition Order*, 11 FCC Rcd at 16128, ¶ 1285; Bell Atlantic Comments at 3.

57 *See* Bell Atlantic Comments at 3.

interconnection agreement with Bell Atlantic in the event the Virginia Commission determined it was not reasonable to require Bell Atlantic to offer the soon to expire 1996 MFS Agreement to GNAPs.[58] Because section 51.801 of the Commission's rules does not focus on the validity of state commission decisions, we do not see a basis for examining the underlying reasoning of the Virginia Commission. While we recognize the frustration GNAPs has experienced in its efforts to obtain interconnection with Bell Atlantic, we cannot conclude that the Virginia Commission has "failed to act" under the Commission's rules implementing section 252(e)(5).

19. Commission precedent supports our conclusion that there is no basis for preemption here. In the *Low Tech Order*, the Commission denied three preemption petitions filed by Low Tech Designs, Inc. (Low Tech), pursuant to section 252(e)(5).[59] The three state commission arbitration proceedings at issue dismissed or denied Low Tech's arbitration petition on the basis that Low Tech was not yet a certified carrier in the relevant state.[60] The Commission held that a state commission has not "failed to act" when it issues a decision that dismisses or denies an arbitration petition on grounds that prevent it from resolving the substantive issues in the arbitration petition.[61] There, as here, the petitioner essentially argued that there was a failure to act because the state commission had erroneously applied the law and our rules in rendering its decision. The Commission concluded that there was no basis to examine the substantive validity of the state commission's decision under section 51.801 of its rules. Accordingly, we do not preempt the Virginia Commission's jurisdiction and do not assume responsibility for this arbitration.

20. Finally, we note that the Commission's decision not to preempt the jurisdiction of the Virginia Commission does not leave GNAPs without a remedy. Pursuant to section 252(e)(6), a party aggrieved by a state commission arbitration determination under section 252 has the right to bring an action in federal district court.[62] Thus, GNAPs may still challenge the Virginia Commission determination in federal district court pursuant to section 252(e)(6).

21. In sum, we conclude that GNAPs has not met its burden of demonstrating that the Virginia Commission has "failed to act" within the meaning of the Commission's rules implementing section 252(e)(5). Rather, the Virginia Commission has met the requirements of

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58 Virginia Commission Comments at 1-3.

59 *Low Tech Order*, 13 FCC Rcd at 1759-1768.

60 *Id.*

61 Low Tech argued that a state commission has not acted until it has ruled on the merits of the issues raised in the arbitration petition. *Id.* at 1733-1774, ¶ 33 n.122. The Commission rejected Low Tech's argument and held that under its current rules, a state commission does not "fail to act" when it dismisses or denies an arbitration petition on the ground that it is procedurally defective, the petitioner slacks standing to arbitrate, or the state commission lacks jurisdiction over the proceeding. *Id.* at 1774, ¶ 33.

62 47 U.S.C. § 252(e)(6); *Local Competition Order*, 11 FCC Rcd 15563, ¶ 124; Bell Atlantic Comments at 2.

the statute and our rules by responding to GNAPs' request for arbitration and rendering a final decision in the arbitration within nine months after Bell Atlantic received GNAPs' request for interconnection. We therefore do not preempt the jurisdiction of the Virginia Commission pursuant to the authority granted the Commission in section 252(e)(5).

IV. CONCLUSION

22. For the foregoing reasons, we deny GNAPs' petition for Commission preemption of jurisdiction of GNAPs' arbitration proceeding with Bell Atlantic in Virginia.

VI. ORDERING CLAUSES

23. Accordingly, IT IS ORDERED that, pursuant to section 252 of the Communications Act of 1934, as amended, and section 51.801(b) of the Commission's rules, 47 U.S.C. § 252 and 47 C.F.R. § 51.801(b), the petition for Commission preemption of jurisdiction filed by Global NAPs South, Inc. on May 19, 1999 is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Robert C. Atkinson
Deputy Chief
Common Carrier Bureau

EXHIBIT C

ORDER NO. 75360

IN THE MATTER OF THE PETITIONS FOR APPROVAL OF AGREEMENTS AND ARBITRATION OF UNRESOLVED ISSUES ARISING UNDER SECTION 252 OF THE TELECOMMUNICATIONS ACT OF 1996.	*	BEFORE THE PUBLIC SERVICE COMMISSION OF MARYLAND
PETITION OF GLOBAL NAPS SOUTH, INC. FOR ARBITRATION OF INTERCONNECTION RATES, TERMS AND CONDITIONS AND RELATED RELIEF.	*	CASE NO. 8731

I. **Procedural History**

On December 7, 1998, Global Naps South, Inc. ("GNAPS") filed its Petition for Arbitration with the Commission.[1] GNAPS requested arbitration of rates, terms and conditions and related arrangements for interconnection concerning a proposed interconnection agreement between GNAPS and Bell Atlantic – Maryland, Inc. ("BA-MD") pursuant to §§252(b) and 252(i) of the Telecommunications Act of 1996 ("1996 Act"). BA-MD filed a response to the Petition on February 9, 1999. The Commission Staff filed comments on March 9, 1999.

II. **Discussion**

In 1996, Congress amended the Communications Act of 1934 with the purpose of fostering competition in both the interexchange and local exchange markets. The Telecommunications Act of 1996 ("1996 Act") was designed, in part, to facilitate the entry of competing companies into local telephone service markets. The 1996 Act

requires incumbent local exchange carriers ("ILECs") to allow new entrants access to their networks in three different ways. Specifically, an ILEC must: (1) permit requesting competitors to interconnect with the ILECs local network; (2) provide competitors with access to individual elements of its network on an unbundled basis; and (3) allow competitors to purchase its telecommunications services for resale. 47 USCA §251(c)(2)-(4) (West Supp. 1997). Together these duties regarding interconnection, unbundled network elements, and resale are intended to provide would-be competitors with realistic opportunities to enter the market for local exchange service. Through these three duties, and the 1996 Act in general, Congress sought "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[2]

The 1996 Act also establishes a system of negotiations and arbitrations in order to facilitate voluntary agreements between ILECs and competing carriers to implement the 1996 Act's substantive requirements. When a competing carrier asks an ILEC to provide interconnection, unbundled network elements, or resale, both the ILEC and the competing carrier have a duty to negotiate in good faith the terms and conditions of an agreement that accomplishes the 1996 Act's goals. 47 USCA §§251(c)(1), 252(a)(1). If the parties fail to reach an agreement through voluntary negotiation, either party may petition the respective state utility commission to arbitrate and resolve any open issues.

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[1] Due to some confusion regarding the service of process, the parties agreed that Bell Atlantic – Maryland, Inc. would respond to the Petition within twenty-five days after January 15, 1999.

[2] Telecommunications Act of 1996, Pub. L. No. 104-104, purpose statement, 110 Stat 56, 56 (1996).

47 USCA §252(b). The final agreement, whether accomplished through negotiation or arbitration, must be approved by the state commission. 47 USCA §252(e)(1).

The key provision of the 1996 Act at issue here is §252(i). Under this subsection, a competitive local exchange carrier ("CLEC") may "opt in" to the terms of any other existing interconnection agreement between the incumbent local exchange carrier ("ILEC") and another CLEC. Specifically, §252(i) states:

> A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved [by a state commission] under this section to which it is a party to any other requesting telecommunication carrier upon the same terms and conditions as those provided in the agreement.

GNAPS has sought to "opt in" to the terms of BA-MD's approved interconnection agreement with MFS Intelenet of Maryland, Inc. ("MFS"). GNAPS claims, however, that BA-MD seeks to impose conditions on GNAPS to which MFS is not subject, in violation of §252(i). Specifically, GNAPS requested to "opt in" to the MFS interconnection agreement but requested a three-year contract term, rather than the date certain which actually appears in the MFS agreement.[3] In contrast, BA-MD argued that GNAPS can only "opt in", if at all, under the exact terms of the MFS agreement. We find that under the Federal Communications Commission's ("FCC") interconnection rules, GNAPS is not entitled to the relief it seeks.

In its First Report and Order implementing the local competition provisions of the 1996 Act, the FCC interpreted §252(i) as permitting CLECs to "pick and choose" among

[3] GNAPS also requested that we order BA-MD to provide interconnection on an interim basis on terms consistent with the MFS agreement. We rejected this request on June 14, 1999.

the provisions of existing interconnection agreements.[4] This interpretation is reflected in the FCC's rule at 47 CFR §51.809 which provides:

> (a) An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to Section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement. An incumbent LEC may not limit the availability of any individual interconnection, service, or network element only to those requesting carriers serving a comparable class of subscribers or providing the same service (i.e., local, access, or interexchange) as the original party to the agreement.
>
> (b) The obligations of paragraph (a) of this section shall not apply where the incumbent LEC proves to the state commission that:
>
> (1) the costs of providing a particular interconnection, service, or element to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement, or
>
> (2) the provision of a particular interconnection, service or element to the requesting carrier is not technically feasible.
>
> (c) Individual interconnection, service, or network element arrangements shall remain available for use by telecommunications carriers pursuant to this section for a reasonable period of time after the approved agreement is available for public inspection under Section 252(f) of the Act.

Although Rule 51.809 generally requires ILECs to make individual interconnection arrangements from existing contracts available to requesting carriers,

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[4] *In Re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499 (1996) ("First Report & Order").

contrary to GNAPS interpretation, this requirement is not without limitations. The rule limits the amount of time during which ILECs must make the terms of existing agreements available to a "reasonable period of time." Thus, under the FCC's reinstated interpretation of §252(i),[5] BA-MD is not required to make the terms and conditions of an existing agreement available to requesting carriers indefinitely, but only for a "reasonable period."

While we decline to set forth the full parameters of a "reasonable period of time" in this proceeding, we do find that GNAPS request, occurring approximately two and a half years after the MFS agreement was available for public inspection, exceeded the bounds of "reasonable period of time." MFS requested interconnection with BA-MD on February 8, 1996. The parties signed the agreement at issue here on July 16, 1996 and filed a joint petition for approval of the agreement on the following day, July 17, 1996. We approved the agreement on October 9, 1996. Unlike most interconnection agreements, the MFS agreement contains a specific termination date. Thus, the MFS agreement ends on July 1, 1999.

According to GNAPS, it first requested terms contained in the MFS agreement in September, 1998. This request occurred nearly two years after the MFS agreement had been approved by this Commission and only ten months before the agreement was to expire. More importantly, GNAPS did not request arbitration of the "opt in" issue until December, 1998. At this point, the MFS agreement was scheduled to expire in

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[5] The Eighth Circuit vacated Rule 51.809 on the ground that it would deter the "voluntarily negotiated agreements" favored by the 1996 Act. *Iowa Utilities Board v. FCC*, 120F.3d 753, 801 (8th Cir. 1998). The Supreme Court subsequently disagreed and reinstated the rule. *AT&T v. Iowa Utilities Board*, ___U.S. ____ (Jan. 25, 1999).

approximately six months. We find that GNAPS request for arbitration did not occur within the reasonable period of time called for by the FCC rules.

Furthermore, we find that even if it were reasonable to permit GNAPS to "opt in" to the MFS agreement at this late date, GNAPS would be entitled to the terms of the MFS agreement only until the termination date of July 1, 1999. GNAPS cannot avoid the fact that the language of the agreement says that its term ends on a stated dated, not "three years from the date hereof." This term was negotiated and agreed upon by both MFS and BA-MD and there is no support for the argument that the length of the contract is not an integral part of the agreement. GNAPS seeks not only to "opt in" to the MFS agreement, but also to change one of its terms. There is nothing in the 1996 Act nor the FCC rules which would permit a CLEC to choose to opt in to an agreement while at the same time changing the terms of that agreement. Opting into contracts must occur upon the same terms and conditions as those which appear in the original agreement.[6]

IT IS THEREFORE, this 15th day of July in the year Nineteen Hundred and Ninety-Nine, by the Public Service Commission of Maryland,

ORDERED: 1) That the request of Global NAPS South, Inc. to opt in to the MFS agreement pursuant to §252(i) of the Telecommunications Act of 1996 is hereby denied.

2) That motions not granted by the actions taken herein are denied.

[6] Given our resolution of this matter, we find that it is unnecessary for us to address the other issues raised in the Petition.

SIGNATURE PAGE

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Commissioners

STATE OF SOUTH CAROLINA)
) CERTIFICATE OF SERVICE
COUNTY OF RICHLAND)

The undersigned, Nyla M. Laney, hereby certifies that she is employed by the Legal Department for AT&T South Carolina ("AT&T") and that she has caused AT&T South Carolina's Motion to Dismiss and, in the Alternative, Answer in Docket No. 2007-255-C to be served upon the following on August 10, 2007.

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